

WORKERS' COMPENSATION ADVISORY COUNCIL

**MINUTES ~ ~ JULY 26, 2001 MEETING [1:00 P.M.]
710 JAMES ROBERTSON PARKWAY
HEARING ROOM, FIRST FLOOR
ANDREW JOHNSON TOWER
NASHVILLE, TENNESSEE**

The meeting was called to order by Mr. Steve Adams, State Treasurer

Voting members in attendance:

Mr. Jack Gatlin
Mr. Dave Goetz
Mr. James G. Neeley
Mr. Bob Pitts [by telephone conference call]

Nonvoting members in attendance:

Ms. Jacqueline Dixon
Mr. Tony Farmer
Ms. Abbie Hudgens
Mr. Jerry Mayo

Ex officio members in attendance:

Senator Joe Haynes
Mr. Mike Magill, Commissioner, Department of Labor and Workforce Development
Mr. Everett Sinor, Assistant Commissioner, Department of Commerce & Insurance
[designee for Commissioner Anne Pope]

Also present:

M. Linda Hughes, Executive Director
Mr. Dale Sims
Mr. Dave Wilstermann, Research Analyst

The minutes of the February 23, 2001, March 2, 2001, and March 9, 2001 meetings of the Advisory Council were unanimously approved.

1. "TENNESSEE LAW ONLY FILING - AMA GUIDE CHANGE" BY NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC. (NCCI).

The first item on the agenda was discussion of the "Law Only Filing" submitted to the Tennessee Commissioner of Commerce and Insurance that requested a +2% increase in the loss cost as a result of changes in the pain chapter of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, published in November, 2000 [hereinafter "5th Edition"]. Executive Director, Linda Hughes, presented a summary of the changes in the 5th Edition of the AMA Guides as compared to the 4th Edition. A copy of the written summary distributed to the Advisory Council is appended hereto as Exhibit 1.

Mr. Tony DiDonato, Actuary, NCCI, explained the rationale behind the NCCI's request for an interim "law only" increase of +2%. He stated the primary reason for the requested increase is the 5th Edition permits the physician to increase the permanent impairment rating from 0% to +3% based solely on pain. He explained while the 5th Edition has other changes besides the pain "add-on" NCCI does not expect most of those changes to impact workers' compensation costs. NCCI's position that the pain "add-on" will increase costs is based on an assumption that 51.3% of the permanent partial claims will not have any additional percentage for the "pain add-on"; 40.6% of the permanent partial claims will result in an additional 1% impairment rating for pain; 4.7% of the permanent partial claims will result in an additional 2% for pain and 3.4% of the claims will have the full 3% added for pain.

In determining the estimated impact of the "pain add-on" in the 5th Edition, because no data exists indicating when the "add-on" will be given, NCCI used its judgment in addition to information obtained through telephone calls to claims personnel in Tennessee as well as other states to determine the impact of the "pain add-on". NCCI, based on these assumptions, estimated the increase in the impairment rating would be +.6%, on average. Adding this amount to the current average impairment rating of 7.2% would equate to a new impairment rating of 7.8%, which is an 8% increase. Mr. DiDonato indicated permanent partial benefits are 25% of total workers' compensation costs and when this is multiplied against the 8% increase, it would equal an impact of +2% on workers' compensation costs in Tennessee.

Several members of the Advisory Council questioned NCCI's method for estimating the impact of the "pain add-on" due to the assumptions made by the NCCI. Mr. Tony Farmer questioned NCCI's assumption that the "pain add-on" increase in the permanent impairment rating results in a proportionate increase in the permanent partial disability award. Mr. Farmer remarked the 5th Edition has changed the impairment ratings for carpal tunnel syndrome so that most cases will have a zero impairment rating. Mr. DiDonato indicated NCCI does not believe this decrease for carpal tunnel impairment will lessen the impact on costs as carpal tunnel syndrome cases account for only 2% of the claims with permanency. Mr. Farmer indicated he believes the number of carpal tunnel claims in Tennessee exceed this percentage.

Mr. Adams asked Mr. DiDonato to explain what would happen if the requested “law only” increase is not approved. Mr. DiDonato explained that NCCI assumes if a filing is disapproved by the Commissioner it is a decision that the change in the law will not impact costs in Tennessee and, therefore, NCCI will not include the law change in its full loss cost filing which will be effective on March 1, 2002. Mr. DiDonato indicated if the filing is not approved, the impact in costs will show up in future data and would be utilized in the full filing made by NCCI in a couple of years. Mr. Dale Sims remarked, and Mr. DiDonato agreed, that if insurance companies believe the change in the AMA Guides will impact costs each company can adjust its individual multiplier to account for the expected impact on its costs.

Ms. Hughes explained to the Advisory Council that the NCCI’s “Law Only Filing” was reviewed by Mr. Greg Alff, consulting actuary to the Advisory Council. A copy of his opinion letter was provided to the members. In summary, Mr. Alff indicated he had no opinions regarding the AMA Guide but, given the NCCI’s assumptions, the mathematical calculations appeared sound.

Mr. Everett Sinor, Assistant Commissioner, Department of Commerce and Insurance, introduced Mr. Ed Costner, the consulting actuary to the Department. Mr. Costner stated he was concerned the revisions and changes in the 5th Edition of the AMA Guides are extensive revisions while NCCI is singling out only one change for the basis of its request for an increase in the loss cost. Mr. Costner explained, while he has no doubt the “pain add-on” will result in increased costs, there are other sections of the Guides which will result in decreased costs. He said discussions he had with attorneys and adjusters in Tennessee revealed they have not formulated an opinion as to the long term impact of the 5th Edition on workers’ compensation claims in Tennessee. He stated, while it is his impression the 5th Edition will result in increased costs, he cannot judge that the NCCI’s analysis is a proper quantification of the impact and he is concerned that the NCCI filing addresses only one segment of the revisions to the Guides. Mr. Costner also questioned whether insurance carriers could implement the requested +2% change in the loss cost by September 1, 2001.

The Advisory Council then entered into discussion of the “Law Only” filing. Mr. Goetz indicated he felt there are insufficient data at this time to support the requested increase. Mr. Neeley stated he felt the requested increase should be included in the full filing for 2003.

Mr. Farmer said his office, which handles hundreds of workers’ compensation cases, has not seen any instance where a doctor has given an increased impairment rating for the “pain add-on” since the 5th Edition was published in November 2000 although he has seen plenty of carpal tunnel cases which received a 0% impairment under the new AMA Guides. He questioned NCCI’s underlying assumptions as he does not feel they are borne out in the real world. He also remarked doctors do not like the statutory requirement of the use of the AMA Guides and noted the law also allows reliance on the Orthopedic Manual [Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment published by the American Academy of Orthopedic Surgeons] which has not been revised since 1957, will not be published again and provides for outlandish impairments.

Ms. Dixon indicated she had not seen any effects from the 5th Edition. She stated in her opinion any increase should wait until better data are available. Mr. Mayo indicated data needs to be reviewed before any increase is called for and noted if carriers are concerned they can adjust their rates by increasing the loss cost multiplier. Mr. Pitts stated he was opposed to any increase at this time and he had a problem with the assumption that a change in the Guides will equate to an increase in a disability benefits, without supporting data.

After the discussion, a motion was made by Mr. Goetz and seconded by Mr. Neeley that the Commissioner disapprove NCCI's requested +2.0% "Law Only" increase. The motion was unanimously adopted by the Advisory Council.

2. STATUS OF TENNESSEE ASSIGNED RISK PLAN

Mr. Tom Redel, Assistant Vice President, AON Risk Services, the plan administrator for the Tennessee Assigned Risk Plan, was recognized to give the members of the Advisory Council a report on the Assigned Risk Plan. Each member of the Advisory Council received a written copy of a report prepared by Mr. Redel. Mr. Redel then made an oral presentation of the highlights of the written report. He reported the following information concerning the Assigned Risk Plan:

- The data AON utilizes is divided into assignment data and report data. Assignment data is an estimate of the annual premium collected when the policy is written or renewed. Report data includes adjustment for policy cancellations, payroll audits or classification changes. AON uses assignment data to project growth of the pool.
- Based on assignment data, in 2000 the pool grew significantly to an estimated premium of \$32.5 million.
- For the first half of 2001, the premium levels continued to increase; as of June 30, the premiums were \$25.6 million and AON anticipates by the end of 2001, the premiums will be approximately \$50 million.
- From 1999 to 2000, the premium volume increased 71.9% [\$19 million to \$32.6 million]; the number of policies increased by 24%.
- Larger accounts which had previously purchased coverage in the voluntary market are migrating to the pool. A comparison of premium ranges from 1999 to 2000 reveals significant growth in some of the larger premium ranges, specifically the accounts which generated from \$50,000 to \$100,000 in premiums [238% increase]. This trend has continued in 2001.
- The average premium size in the pool in 1999 was \$3800; for 2000 it was \$5300.
- Based on report data [reported quarterly by carriers], the total premium in the pool for 1998 was \$23.1 million; for 1999 it was \$20.8 million; for 2000 it was \$36.5 million. This is evidence the market began to change during 2000.
- AON anticipates a deficit for plan year 1998 of \$3.4 million; and a deficit of \$1.8 million for plan year 1999. Data are not yet in for 2000.

3. REPORT RE: UNINSURED EMPLOYERS PROGRAM

Commissioner Magill reviewed several issues he felt should be brought to the attention of the Advisory Council. Since the Uninsured Employers Program became effective January 1, 2001, procedures have been implemented to identify noncompliant employers and the Workers' Compensation Division is cross referencing data concerning unemployment insurance records maintained by the Division of Employment Security to identify employers who may be noncompliant. Commissioner Magill noted the Department has probably identified some employers during the past six months about which the Department of Revenue probably is unaware. Commissioner Magill also explained a problem which arose in west Tennessee dealing with an employee leasing firm who was not paying taxes, unemployment insurance or providing workers' compensation insurance.

He stated he wanted the Advisory Council to be aware of the effect the budget constraints will have on the Workers' Compensation Division:

- 88% of the Department's budget is federal money; 12% is state dollars; one-half of the 12% is in the Workers' Compensation Division and the other half is used to match federal dollars.
- Cuts in the Department's budget will seriously impact the Workers' Compensation Division.
- All judicial districts now require a workers' compensation case to go through a benefit review conference [mediation]. A few years ago the Division conducted 300 mediations and this year they expect to conduct 4000, with basically the same number of personnel.
- The legislature funded half of the requested money to implement the Uninsured Employers Program in fiscal year 2000 and while the other half was to be funded in fiscal year 2001, those funds were cut out of the budget.

Commissioner Magill then introduced Mark Finks, Director of the Uninsured Employers Program, to provide a overview of the program since its implementation. Mr. Finks reported the following information concerning the Uninsured Employers Program:

- From November 1, 2000 through January, 2001, the staff consisted of a program coordinator, manager of investigations and an administrative assistant who worked to establish research and investigative policies, procedures and daily responsibilities necessary to implement both the text and the spirit of the legislation.
- A draft of the proposed rules of the "Uninsured Employers Fund" were sent to the Attorney General's Office for review, as required by law.
- On March 1, 2001, the legal counsel for the Uninsured Employers Program began working with the program to review case files, determine which employers are in violation of the law, send out certified letters and prepare cases for show cause hearings.

- Two workers' compensation representative positions were created and filled (one in Knoxville and one in Jackson) on April 9, 2001; on May 16, a legal assistant was hired. Mr. Finks indicated the program is trying hire two additional "workers' compensation representatives", one for Nashville and one for Chattanooga plus an administrative secretary for the Nashville office.
- As of December, 2000, the list of noncompliant employers contained 412 employers. After that date the Uninsured Employers Program continued to research and investigate the original list through telephone calls, letters, on-site coverage inspections, review of wage and premium reports for unemployment insurance purposes, Internet searches, searches of the Workers' Compensation System and the NCCI databases.
- Investigations have been conducted on 219 of the 412 employers on the original noncompliant list - 122 were found to be exempt from the workers' compensation laws; 17 had been self-employed and were no longer working; 80 had moved, gone out of business or could not be located.
- The staff continues to investigate the 80 employers who could not be located and continue to investigate the remaining 193 employers from the original list of 412 noncompliant employers.
- Staff have opened investigations and made coverage searches of over 400 other employers who may be noncompliant. Three of these are professional employment organizations [PEOs] and their client-employers.
- Two of the PEOs, Transway Inc. and Progressive Systems, Inc., have filed for bankruptcy. Bankruptcy claims in the amount of over \$500,000 have been filed against Transway and over \$452,000 against Progressive. The Attorney General's office has advised the Uninsured Employers Program that any additional procedures against these employers would violate the automatic stay of the bankruptcy court. The holding company for these two PEOs, WBA Holdings, LLC, entered into an settlement agreement and paid \$3,056.63 in penalties; the agreement does not release WBA from possible liability in the proceedings against the two PEOs. Investigations continue against the third PEO, T.T.C. Illinois, Inc.
- The Program has received requests for investigations on 132 employers who may be noncompliant. These requests have come from injured employees and their attorneys, benefit review staff, other department employees, TBI agents, other state agencies.
- Sixteen (16) certified letters have been mailed to employers that investigations revealed were noncompliant. Nine (9) have entered into settlement negotiations and agreed to pay the first penalty. Five (5) employers agreed to settle and pay the first monetary penalty prior to the certified letter being sent. Two show cause hearings have been held. Employers have paid a total of \$5,048 in penalties; these monies have been deposited into the Uninsured Employer's Fund account.

- In the future, the Program plans to look for better methods to identify uninsured employers; to utilize the workers' compensation computer system more effectively; and to establish procedures for collection of unpaid penalties.

Following Mr. Fink's presentation, the members discussed the issue of PEOs and problems associated with the west Tennessee companies. Mr. Goetz expressed concern as to how the "employer-client" could be notified if workers' compensation coverage was not maintained by the PEO. Commissioner Magill noted in the west Tennessee cases the "employer-clients" had been provided a certificate of insurance, but the certificate was not valid. He expressed this situation has caused severe problems for the "employer-clients" and their "employees". Ms. Hughes noted the PEOs are not regulated by the Department of Labor and Commissioner but rather by the Department of Commerce and Insurance.

Mr. Sinor stated the Regulatory Boards Division of the Department of Commerce and Insurance, not the Insurance Division, regulates PEOs. He informed the Advisory Council that in reaction to the massive fraud which occurred in west Tennessee, the Regulatory Boards Division is looking at the entire PEO law to see what part of the law should be changed or what controls should be implemented. Mr. Sinor said the Insurance Division feels this was a PEO company acting like an insurance company without a license and these type frauds are very hard to detect.

Mr. Neeley commented the statute needs to be addressed to include some type of surety bond requirement. He also noted concerns about another company which in six or seven states is misclassifying employees when they pay their premiums, which would be fraud under the Tennessee statute. Mr. Mayo stated the only way to detect this type of fraud is through the audit process later. Commissioner Magill noted the PEO organization is also concerned about the fraudulent PEO problem and would probably be interested in strengthening the law.

Mr. Sims inquired as to the number of noncompliant employers compared to the total number of employers in the state. Commissioner Magill indicated it is probably from one-half of one percent to one percent.

Commissioner Magill noted through the process of investigating noncompliant employers, the Department is finding situations where the employer did not know they were required to have workers' compensation coverage. He requested the Advisory Council to consider whether the law should be changed to have a different standard of penalties for those employers who willfully violate the law from those who are not willful in their violation. Mr. Adams stated he thought it was an issue the Advisory Council could review and invited the Commissioner to bring recommendations to the Advisory Council for consideration.

4. ADDITIONAL ISSUES/COMMENTS

Ms. Hughes informed the members that written materials from Karen Alexander, TBI Fraud Unit, concerning information requested by the Advisory Council during the meeting on proposed legislation was included in their meeting materials for their review. Ms. Hughes also explained which workers' compensation legislation has not been enacted because it is being held "behind the budget". Members were requested to review the draft Annual Report and relate changes to Ms. Hughes by August 8, 2001.

The meeting was then adjourned by the Chair.

“EXHIBIT 1”

5th EDITION - AMA GUIDES SUMMARY OF CHANGES FROM 4TH EDITION¹

(Prepared by: M. Linda Hughes)

GENERAL INFORMATION [Chapters 1 & 2]

- Definition of Activities of Daily Living [ADLs] now **exclude work**.
- Maximum Medical Improvement: when condition unlikely to change significantly in the next year.
- Rounding off of numerical impairments has changed. No longer round to next 5%, now round to next whole number.

RESPIRATORY SYSTEM [Chapter 5]

- Changes definition of “normal” pulmonary function to more restrictive definition which will result in lower impairment ratings.
- Recognizes occupational asthma and provides specific impairment ratings.

VISUAL SYSTEM [Chapter 12]

- Chapter is extensively revised. Adopts new evaluation scale to estimate vision loss effect on ability to perform activities of daily living and gives specific impairment ratings.

NERVOUS SYSTEM [Chapter 13]

- For head trauma induced diminished intellect and seizures, no longer allows the ratings for each to be combined; now must choose lower of the two ratings.

¹This compilation is derived primarily from a presentation made by James B. Talmage, M.D. on July 9, 2001 at the SAWCA Convention in Nashville, Tennessee.

MENTAL AND BEHAVIOR DISORDERS [Chapter 14]

- No changes have been made - still does not give numerical impairment ratings.

THE SPINE [Chapter 15]

- Impairment ratings to be based on medical findings **at maximum medical improvement [MMI]**, not at time of injury.
- “Injury Method” [formerly called “injury model”] PPI ratings now a range, not discrete number. Ratings may increase up to 3 percentage points depending on resolution or continuation of symptoms and their impact on the ability to perform activities of daily living [excluding work].
- Back injury with early muscle spasm but **no** objective symptoms at MMI, will be rated as 0%, not 5% as under 4th Edition.
- “Range of Motion Method” will be used more often [disease, not injury; recurrent radiculopathy; multilevel involvement] and will probably result in higher impairment ratings because the various range of motion impairments are added to underlying pathology rating.

UPPER EXTREMITIES [Chapter 16]

- Entrapment Table is eliminated; therefore, no longer to give a percentage rating based on “mild, moderate, or severe” entrapment of median nerve for carpal tunnel syndrome cases.
- Carpal Tunnel Syndrome: Evaluated after optimal recovery time.
- 98% of carpal tunnel syndrome cases [with surgery] will receive impairment ratings of 1%-5%. If normal sensation, strength and EMG following surgery, receive 0% PPI.
- Does not provide for a rating of carpal tunnel syndrome **without** surgery.
- Established specific criteria for diagnosis of Complex Regional Pain Syndrome (CRPS) which should result in fewer diagnoses.
- For Raynaud’s phenomenon diagnosis, objective arterial damage is required and does not allow impairment ratings in Classes 3,4 and 5, which are higher PPI ratings.

- Recognizes shoulder instability (dislocation or recurrent dislocation) will result in impairment.
- Recognizes successful surgical repair of rotator cuff tear or biceps tendon rupture will result in loss of strength even if range of motion is normal. Give impairment percentages for loss of strength.

LOWER EXTREMITIES [Chapter 17]

- Few Changes.

PAIN [Chapter 18]

- Chapter completely revised.
- Provides qualitative method of evaluating chronic pain and permits numerical impairment ratings.
- Pain chapter **SHOULD NOT BE USED**:
 - >when pain is adequately rated by other chapters; however, no guidance given.
 - >when rating individuals with low credibility; no rules for assessing credibility.
 - >when the pain syndrome is ambiguous or controversial.
- Pain chapter **SHOULD BE USED** in cases involving:
 - >excess pain in verifiable medical conditions [apparently chapter author did not realize spine chapter now allows range of impairment which can be additional 3%.]
 - >well established syndromes without identifiable organ dysfunction [CRPS]
 - >identifiable organ dysfunction but pain syndrome is not predictable so underlying condition does not capture added burden of pain.
- If pain-related impairment appears to increase the burden of the condition **slightly**, underlying PPI may be increased by UP TO 3% (i.e., 1, 2 or 3).
- If pain-related impairment appears to increase the burden of the condition **substantially**, underlying PPI may be increased BY 3%. Evaluator required to conduct formal pain assessment although this does not result in additional numerical impairment percentage beyond the 3%.